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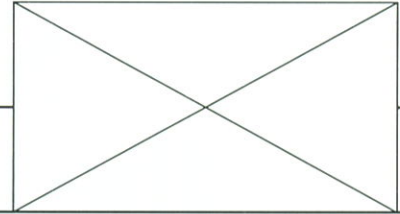
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Legally Speaking

by **Glen Secor** (Yankee Book Peddler, Inc.
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In December, as the country was observing the bicentennial of the passage of the Bill of Rights, a number of First Amendment-related issues appeared in the news. Salman Rushdie, having also failed to find that moderate faction in Iran, did an about-face and called for the paperback printing of *Satanic Verses*. David Duke, running for president after being thumped in the Louisiana gubernatorial election, was temporarily barred from the primary ballot in Massachusetts by the Secretary of State. The ACLU threatened a lawsuit on Duke's behalf (once again proving that politics does indeed make for strange bedfellows), prompting the Secretary to reverse his position in early January.

The focus of this column, though, will be on the December decision of the U.S. Supreme Court in *Simon & Schuster v. New York State Crime Victims Board*, striking down New York's "Son of Sam" law. Despite a unanimous finding by the Court that the statute violated the First Amendment, the true outcome of the case is up for discussion (see *Publishers Weekly*, 1/1/92, pp. 16-17). Before declaring this a complete victory for free speech and the publishing industry, let's take a closer look at the decision.

This case arose from a challenge by Simon & Schuster to NY Executive Law section 632-a (the "Son of Sam" law), which provided for the escrowing of royalties and other income accruing to a convicted criminal from the production of a book or other work describing the crime. The escrowed funds were then to be made available to the victim of the crime, so long as the victim obtained a money judgment against the criminal within five years of the establishment of the escrow account. In other words, the statute attempted to ensure that victims were compensated before a criminal could

enjoy any profits related to the telling of his story.

Simon & Schuster brought the suit in response to an escrow order relating to the publication of *Wiseguy*, the story of mobster Henry Hill (which was later made into the movie "GoodFellas"). A federal district court upheld the statute and found against Simon & Schuster in 1989, and a federal appeals court affirmed the decision in 1990.

In declaring the statute unconstitutional and reversing the decisions of the lower courts, the Supreme Court followed a well-established three-step analysis for free speech cases:

1. Is the statute/regulation "content-based?"
2. If "yes" to #1, does the government have a compelling interest in the objectives of the statute?
3. If "yes" to #2, is the statute narrowly tailored to achieve the government's objective?

If the answer to #1 is "no," then a different analysis, which is beyond the scope of this article, is applied. If the answer to either #2 or #3 is "no," then the statute is an unconstitutional violation of free speech. In this case, the Court answered "yes" to #'s 1 & 2, and "no" to #3. It is only because the Court found the statute to be overinclusive that the law was struck down, which is why the impact of the case is a matter of debate for publishers and publishing lawyers.

A full explanation of the legal principles and the Court's reasoning is not possible here, but the following summary should be helpful. "Content-based" regulations are those aimed at a particular type of speech. Clearly, the

"Son of Sam" law was content-based, in that it applied only to speech by a criminal related to his or her crime. (Aside: the law did not apply if the book or work was produced without the participation of the criminal; and the only income from a project subject to escrow was that of the criminal, not the publisher's or author's.) An argument was advanced in one noteworthy 1991 law review article that the law regulated the contractual relationships of the criminal only, not the speech itself. While there is perhaps some merit to this argument, the Court's conclusion that the statute created an incidental, content-based burden on speech is reasonable.

The key to this case is the Court's finding that the State has a compelling interest in preventing criminals from profiting from their crimes and in compensating victims of crime. Once this determination is reached, ie. when question #2 of the inquiry is answered affirmatively, it is possible that a law can be written so as to pass the third step of the test. Without a compelling interest, the law is unconstitutional regardless of how narrowly it is drafted. By finding a compelling government interest, the Court has made it possible for a restriction like the "Son of Sam" law to pass constitutional muster, although New York's statute flunked in this case.

The New York "Son of Sam" law was struck down because it was not drawn narrowly enough. In a nutshell, the Court could not accept the fact that the law singled out one type of income, while excluding other income and assets of the criminal. In other words, if the State's interest is in compensating victims from the fruits of crime, then *all* related income and assets of the criminal should be escrowed for this purpose. Because the law targeted only one type of income, and because

that income related to expression, the law placed an unconstitutional burden on free speech.

Applying the traditional three-step free speech analysis to this case, the Court's conclusion is reasonable. The decision, though, opens the door for legislatures to redraft their "Son of Sam" laws so that they *are* narrowly-tailored. How widely the door has been left open is now being disputed (again see *PW* 1/1/92, pp. 16-17). One interpretation is that the *Simon & Schuster* case is a hollow victory for the publishing industry, as states will now amend their "Son of Sam" laws to comport with this decision. Others argue that the Court has left very little room for legislative redrafting. I suspect that we will not know which side is correct until an amended law is challenged in court.

What is important for those of us in the information field to take away from this case is an understanding that First Amendment decisions are rarely as

straightforward as they might seem to be from mainstream press reports. If the Supreme Court were to come back in the future and uphold an amended "Son of Sam" law, one might be inclined to think that the Court had reversed itself, eroding First Amendment protections in the process. In fact, as I have tried to point out here, such a future decision would be right in line with the *Simon & Schuster* case, assuming that the statute is properly amended.

In his concurring opinion, Justice Kennedy attacks the legal analysis itself, criticizing the majority for even considering steps #2 and #3 of the inquiry. His argument is that once question #1 is answered affirmatively, ie. the regulation is found to be content-based (and is not among the categories of speech which have been excluded from First Amendment protection: defamatory speech, obscenity, incitement to lawless action, et. al.), then the statute is *automatically* unconstitutional. For

Kennedy, compelling State interests and narrow tailoring are irrelevant in such instances: content-based burdens on speech amount to "raw censorship" and are unconstitutional, period.

Many of us, upon hearing of this case, probably assumed that the decision was based upon logic similar to Justice Kennedy's. It was not. In fact, while Justice Kennedy uses the term "censorship" numerous times in his concurring opinion, the phrase does not appear even once in the majority opinion penned by Justice O'Connor. For my part, I find Justice Kennedy's logic and characterizations cleaner and more compelling than those of Justice O'Connor. As the commentary of experts in the wake of the decision indicates, the "compelling interest" door has been opened, and it is not clear whether the "Son of Sam" laws can be amended to take advantage of this opening. Again, only time and further litigation will tell. ☛

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